WONG CHOW v. LOOI KIM CHOY.

[C.A. (Mathew, C.J., Sir Charles Murray-Aynsley, C.J. (S.) and Pretheroe, J.) March 18, 1953]

[Ipoh — F.M. Civil Appeal No. 7 of 1952]

Mining lease — Interpretation — Meaning of mining operation.

This was an appeal against the decision of Thomson, J. reported in (1952) M.L.J. 20.

The case for the appellant was argued on two grounds:

(i) that the learned trial judge was wrong in holding that "boring" amounted to a mining operation; and

(ii) that there was no conflict between clause 2 in the supplemental agreement and clause 8(iii) of the sub-lease and that therefore the appellant was entitled to refuse to renew the sub-lease because there had been a breach of the stipulation therein which related to the employment of 71 labourers.

Held: affirming the decision of the learned trial judge: the stipulations in the sub-lease had been carried out and therefore the respondent was entitled to a renewal of the sub-lease.

CIVIL APPEAL.

S. K. Das for the appellant.

F. G. Pooley (*K. C. Chan* with him) for the respondent.

The judgment of Mathew, C.J., with which Sir Charles Murray-Aynsley, C.J.(S) and Pretheroe, J. concurred, was read in open Court by Pretheroe, J.

Mathew, C.J. : — The claim in this case arose out of the failure of the appellant to renew a sub-lease of certain mining land. The respondent based his claim on an agreement, the three relevant clauses of which read :—

"1. The sub-lessor agrees to renew the said sub-lease on its expiry yearly for a further period of 4 years on the same terms and condition; provided always that the sub-lessee has carried out the stipulations in the said sub-lease to the satisfaction of the sub-lessor.

2. If, at any time during the continuance of the said sub-lease or any renewal thereof the sub-lessee shall cease mining operations on the said land continuously for a period of 6 months the sub-lessor shall have the right to refuse to grant any further renewal thereof.

4. The sub-lease shall be read and construed and be enforceable as if the terms of this agreement were incorporated therein."

The learned trial judge held in construing the sub-lease and the supplemental agreement that there was a conflict between clause 2 of the supplemental agreement and clause 8(iii) of the sub-lease which reads :—

"That this sub-lease shall be liable to cancellation at any time at the discretion of the Senior Inspector of the Court upon proof.....

(iii) that the sub-lessee has not during a period of six months employed at least 71 labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii)(b) of the Mining Enactment for not less than one month in mining the land."

He dealt with this question as follows :—

"To my mind the only possible solution of the difficulty is that the parties intended that the provisions of the supplemental agreement should over-ride the corresponding provisions of the sub-lease or at the very lowest that they intended that a failure to comply with para 8(iii) of the sub-lease should not be regarded as a failure to comply with the stipulations of the sub-lease for the purposes of the first condition contained in the supplemental agreement unless it amounted to a failure to comply with the second condition in that supplemental agreement."

The learned trial judge then considered whether the respondent had ceased mining operations continuously for a period of six months and found that he had not.

The case for the appellant has been argued on two grounds only :—

(i) The learned trial judge was wrong in holding that "boring" amounted to a mining operation; and

(ii) That there was no conflict between clause 2 in the supplemental agreement and clause 8(iii) of the sub-lease and that therefore the appellant was entitled to refuse to renew the sub-lease because there had been a breach of the stipulation therein which related to the employment of 71 labourers.

So far as the question relates to whether the palong scraping and the boring fell within the period of six months prescribed in clause 2 of the supplemental agreement, I am not prepared to interfere with the learned trial judge's finding of fact. As regards "boring", I agree with the learned trial judge that boring in this particular mining proposition was a mining operation. The appellant has argued that "boring" is nothing more than prospecting and that prospecting is not a mining operation. It is an essential art of mining that an area should be proved and a plan made by which the maximum amount of ore can be extracted from the area. The manner in which the operation is to be carried out is the concern of the Mines Department. If the contention that the boring carried out on those mining properties was not a mining operation, one would have expected expert evidence to have been called on this point. In my view "boring" in the special circumstances of this case amounted to a mining operation within the meaning of the supplemental agreement.

I agree with the learned trial judge's view as to the manner in which the sub-lease and the supplemental agreement should be construed, subject to one comment. The sub-lease follows the statutory form required by section 36(i) of the Mining Enactment (Cap. 147). Clause 8 merely reserves to the Senior Inspector the right to cancel a sub-lease in certain circumstances. These rights were never exercised by the Senior Inspector, and clause 8 requires no consideration in determining the question in issue.

The learned trial judge held, in my view correctly, that the stipulations in the sub-lease had been carried out and that therefore the respondent was entitled to a renewal of the sub-lease. I would accordingly dismiss this appeal with costs and order that the deposit of $500 be paid to the respondent against his costs.

Appeal dismissed.

KIAH BINTE HANAPIAH v. SOM BINTE HANAPIAH.

[C.A. (Mathew, C.J., Sir Charles Murray-Aynsley, C.J. (S.) and Spenser Wilkinson, J.) March 16, 1953]

[Penang — F.M. Civil Appeal No. 54 of 1952]

Muslim law — Gifts — Whether gift was complete — Whether Malay type wooden house resting on stilts and not buried into earth moveable property.

The plaintiff-respondent in this case was the grand-daughter of one Haji Hassan bin Musa (deceased). During his lifetime he erected a wooden house and when it was completed gave it in the presence of witnesses to the grand-daughter. On his death the appellant entered into possession of the house which stood on her land. On being asked by the respondent to hand over the house she refused and proceedings were instituted. The learned trial judge held that the house was built by the grandfather and that the house was given to the plaintiff by word of mouth which gift was complete by the plaintiff taking immediate possession of it. The appellant appealed on two main grounds. She contended, (i) that the house was attached to the land and therefore belonged to the appellant who was the owner of the land, and (ii) the gift was incomplete as the gift was not to take effect till death.

Held: (1) it is well-established that houses of the Malay type resting on stilts and not buried into the earth are moveable property; (2) (Sir Charles Murray-Aynsley, C.J. dissenting) the gift was complete at the moment of the formal presentation and was therefore valid.

CIVIL APPEAL.

Lim Eng Cheang for the apppellant.

Jag-Jit Singh for the respondent.

Cur. Adv. Vult.

Mathew, C.J. : — The facts in this case are simple. The plaintiff-respondent is the grand-daughter of one Haji Hassan bin Musa (deceased). During his lifetime he erected a wooden house (Malay type on stilts) and when it was completed gave it in the presence of witnesses to his grand-daughter. On his death the appellant entered into possession of the house which stands on her land. On being asked by the respondent to hand over the house she refused, and these proceedings were instituted. The learned trial judge concluded his grounds of judgment with the following passage :—

"I am satisfied that the house was in fact built by the grand-father and not by her and her husband, and that the house was given to the plaintiff by word of mouth which gift was complete by the plaintiff taking immediate possession of it."

The appeal against that decision is on two main grounds.

(i) the house is attached to the land and therefore belongs to the appellant who is the owner of the land;

(ii) the gift was incomplete as the gift was not to take effect until his death.

As regards the first ground, it is well established that houses of the Malay type resting on stilts not buried into the earth are moveable property and have always been so regarded. The second ground presents more difficulty.

Raja Awang bin Musa, who was present at the presentation of the house to the respondent, gave evidence that the deceased gave the house to the respondent and told her that she could remove the house after his death. Another witness, Din bin Mat, said that the respondent's grand-father told him that "the house was for the plaintiff and while he was alive he would live there".

The evidence tends to show that the gift was only to take effect on the grand-father's death and was therefore incomplete. Mohamedan Law on the subject of gifts is dealt with in *Nawawi's* Mohammedan Law at page 234 :—

"It is an essential condition for the validity of a gift properly so-called that offer and acceptance be made in explicit terms; but in the case of a present neither offer nor acceptance are strictly necessary; it is enough if the object is brought by the donor and taken possession of by the donee. By saying to some one 'I want you to live in this house of mine and it shall pass to your heirs after your death', one makes a gift, as also by merely saying 'I want you to inhabit it', at least according to the doctrine adopted by Shafii in his second period, or by saying, 'After your death it will return to me'. Shafii in his first period expressed an opinion different from that adopted in his second as to the validity of a gift made in the following terms, 'I grant you a life interest in this house, or 'I make you a gift of it for life'; that is, if you pre-decease me it will return to me, but otherwise it will be yours irrevocably. Nowadays, however, in our school, both of the Imam's opinions have equal currency."

In my view, the formal presentation in the presence of witnesses was a complete gift, particularly when it is borne in mind that the grand-father, on the evidence of Haji Awang bin Musa, disposed of all his property to his grand-children during his life. It is also significant that the appellant abandoned at the trial her defence that the gift was void under Mohammedan Law, and relied solely on her contention that the house had been built by her husband, a defence which was manifestly untrue. In any event there was, in my view, a constructive delivery of possession at the formal presentation, and I think it would be unreal to construe the grand-father's expression of intention to remain in the house for the rest of his life as a condition